



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

[REDACTED]
Eugenia C.,¹
Complainant,

v.

Richard V. Spencer,
Secretary,
Department of the Navy,
Agency.

Appeal No. 2019000953

Agency No. 18-66604-02521

DECISION

On November 24, 2018, Complainant filed a timely appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from a final Agency decision (FAD) dated October 26, 2018, dismissing her complaint of unlawful employment discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 et seq.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked for a staffing firm serving the Agency as an Administrative Assistant at the Agency's Naval Undersea Warfare Center Division - Newport in Rhode Island.

On September 27, 2018, Complainant filed an equal employment opportunity (EEO) complaint alleging that she was subjected to harassment and/or discrimination based on her age (59 - 61) and reprisal for prior protected EEO activity (participated as a witness in an Agency employee's EEO case) when:

1. In August 2015, the Agency Division Head of Code 852 said "well, we can't touch [her] for a year", regarding the EEO investigation she participated in as a witness.

¹ This case has been randomly assigned a pseudonym which will replace Complainant's name when the decision is published to non-parties and the Commission's website.

2. On September 9, 2015, the Agency Branch Head of Code 8524 raised her voice to her about her transfer to another staffing firm position serving the Agency.²
3. On September 25, 2015, she asked that her meeting with the staffing firm President and staffing firm Human Resources (HR) Manager be discreet, but at least three people saw her go in and come out of the meeting.
4. In late September 2015, the Agency Department Head of Code 85B remarked to her staffing firm that she was “gossiping and pot stirring...[and] caused continuous troublemaking in the building.” She learned this in December 2015.
5. Around October 2015, her first line onsite supervisor (S1), who was with the staffing firm, assigned her additional work equal to full time work, even though she already had full-time duties.
6. On December 22, 2015, she learned that her staffing firm did not post and then selected a much younger person for a staffing firm branch administrative position that served the Agency.
7. On January 18, 2016, S1 said to another staffing firm employee that Complainant was not to be trusted and “will throw you under the bus”.
8. On January 20, 2016, the staffing firm HR Manager wrote an email to her in all capital letters.
9. On February 22, 2016, the staffing firm HR Manager asked her if she still lived alone.
10. On or about March 20 – 29, 2016, S1 sent an email to a staffing firm employee that included confidential information on Complainant and inferred she was a rat.
11. On April 4, 2016, more than four months late, she received her staffing firm performance evaluation from S1.
12. On May 4, 2016, S1 assigned her a tasking that created more than a full-time work load.
13. On June 10, 2016, she was told by a staffing firm employee that a couple staffing firm people were “pissed” at her.
14. Around September 2016, a staffing firm administrative person told her that if she was caught talking to Complainant, she and another staffing firm administrative person would get upset.

² Complainant indicated this person expressed disappointment and was upset that Complainant was transferring. Attachment to EEO Complaint, p. 3.

15. On September 20, 2016, a staffing firm employee who was an assistant to her staffing firm Program Manager intentionally sent out the weekly job order list with her name but no accompanying job order, which Complainant took as a catty joke.
16. On October 31, 2016, she was told by a fellow staffing firm coworker that S1 said Complainant had “a big mouth”.
17. On December 13, 2016, while she was home sick, S1 sent her 13 harassing texts to her on her personal cell telephone regarding the location of a binder.
18. On December 20, 2016, S1 gave her a negative performance review.
19. On September 13, 2017, her staffing firm refused to provide the Rhode Island Commission for Human Rights, which was processing her administrative EEO charge against the staffing firm, her personnel file unless she signed a release because it contained medical records, but there were no medical records therein.
20. On October 5, 2017, during her performance review, S1 provided her an unsigned thank you letter by Complainant’s staffing firm Program Manager, and despite her request, her Program Manager refused to sign the letter.
21. On October 11, 2017, she was not selected for staffing firm for a branch administrative position.
22. In late November 2017, the Agency Technical Director gave her an unfriendly look while sitting near her at a gage in a Washington, DC airport.
23. On January 8, 2018, the Agency Branch Head of Code 8533 invited all staffing firm administrative personnel in Code 853, except her, to a farewell gathering.
24. The Agency Department Head of Code 85 and his Agency subordinate acting Branch Head of Code 8535 influenced her staffing firm, causing her not to be selected for a staffing firm administrative assistant position on or about February 6, 2018.
25. Around March 2018, she received an email by the staffing firm HR Manager stating she should never send FOUO-PS travel documents without them being marked as such and without encrypting them.
26. On March 20, 2018, an Agency employee by email asked her to transmit a document, writing the staffing firm senior administrator was slammed with work now doing a bunch of urgent document transmittals, and Complainant was later told by another identified person that the senior administrator arranged for this task to be assigned to Complainant not because the work needed to be done, but to mock her claim that she was slammed with

work since she asserted Complainant was the most underutilized staffing firm administrator.

27. On March 22, 2018, an idea she presented to S1 was returned to her as good but not needed.
28. The Agency Department Head of Code 85 and his Agency subordinate acting Branch Head of Code 8535 influenced her staffing firm, causing her not to be selected for a staffing firm administrative assistant position on or about June 8, 2018.
29. On June 14, 2018, she was asked to meet with the President and HR Manager of the staffing firm.

The Agency dismissed the entire complaint for failure to state a claim. It reasoned that under common law, it did not have sufficient control over Complainant's employment to be deemed her employer. Rather, the staffing firm had such control. The Agency found that claims 3, 5, 6 – 21, and 24 – 29 also failed to state a claim because these actions were taken by the staffing firm, and the Agency did not have the ability to remedy these claims.

The Agency further dismissed claims 1, 2, 4, 6, 8, 9, 13, 15, 21 - 23, 25 - 26, and 28 for failure to timely initiate EEO counseling. It reasoned that Complainant initiated EEO counseling on June 14, 2018, beyond the 45-calendar day time limit. The Agency found Complainant was aware of this time limit since she was responsible for posting Naval Undersea Warfare Center Division – Newport EEO posters, and that her charge with the Rhode Island Commission for Human Rights showed she long had a reasonable suspicion of discrimination. She jointly filed her claim of discrimination against the staffing firm with the Rhode Island Commission for Human Rights and the EEOC on or about March 20, 2017.

ANALYSIS AND FINDINGS

The first matter before us is whether the Agency properly dismissed Complainant's entire complaint for failure to state a claim on the basis that she was not its employee. EEOC Regulation 29 C.F.R. § 1614.103(a) provides that complaints of employment discrimination shall be processed in accordance with Part 1614 of the EEOC regulations. EEOC Regulation 29 C.F.R. § 1614.103(c) provides that within the covered departments, agencies and units, Part 1614 applies to all employees and applicants for employment.

In Serita B. v. Department of the Army, EEOC Appeal No. 0120150846 (November 10, 2016), the Commission recently reaffirmed its long-standing position on "joint employers" and noted it is found in numerous sources. The sources include EEOC Compliance Manual Section 2, "Threshold Issues," Section 2-III(B)(1)(a)(iii)(b) (May 12, 2000) (Compliance Manual); EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (Dec. 3, 1997) (Enforcement Guidance), "Coverage Issues," Question 2; Ma v. Dep't of Health and Human Servs., EEOC Appeal Nos.

01962389 & 01962390 (May 29, 1998). We reiterate the analysis set forth in those decisions and guidance documents in this decision.

The term “joint employer” refers to two or more employers that each exercises sufficient control of an individual to qualify as the worker’s employer. Compliance Manual, Section 2-III(B)(1)(a)(iii)(b). To determine whether the Agency has the right to exercise sufficient control, EEOC considers factors derived from common law principles of agency. See Enforcement Guidance, “Coverage Issues,” at Question 2. EEOC considers, *inter alia*, the Agency’s right to control when, where, and how the worker performs the job; the right to assign additional projects to the worker; whether the work is performed on Agency premises; whether the Agency provides the tools, material, and equipment to perform the job; the duration of the relationship between the Agency and the worker whether the Agency controls the worker’s schedule; and whether the Agency can discharge the worker. EEOC Compliance Manual, Section 2-III(A)(1) (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323-24 (1992)); EEOC v. Skanska USA Bldg., Inc., 550 F.App’x 253, 256 (6th Cir. 2013) (“Entities are joint employers if they ‘share or co-determine those matters governing essential terms and conditions of employment’”) (quoting Carrier Corp. v. NLRB, 768 F.2d 778, 781 (6th Cir. 1985); see also Ma, EEOC Appeal Nos. 01962389 & 01962390).

The language of the contract between the agency and the staffing firm is not dispositive as to whether a joint-employment situation exists. In determining a worker’s status, EEOC looks to what actually occurs in the workplace, even if it contradicts the language in the contract between the staffing firm and the agency. Baker v. Dep’t of the Army, EEOC Appeal No. 01A45313 (Mar. 16, 2006) (while contract between staffing firm and agency provided that contract personnel were employees of staffing firm under its administrative supervision and control, agency actually retained supervisory authority over the contract workers).

On the factor of the right to control when, where, and how the worker performs the job and to assign additional projects, complete agency control is not required. Rather, the control may be partial or joint and still point to joint employment. Shorter v. Dep’t of Homeland Sec., EEOC Appeal No. 0120131148 (June 11, 2013) (where both staffing firm and agency made assignments, this pointed to joint employment); Complainant v. Dep’t of the Navy, EEOC Appeal No. 0120143162 (May 20, 2015), request for reconsideration denied, EEOC Request No. 0520150430 (Mar. 11, 2016) (where staffing firm wrote and issued complainant’s appraisal with input from agency, this pointed toward joint employment). Likewise, where both the agency and staffing firm provided tools, material, and equipment to perform the job, this pointed to joint employment. Elkin v. Dep’t of the Army, EEOC Appeal No. 0120122211, 2012 WL 5818075 (Nov. 8, 2012). Similarly, where a staffing firm terminates a worker after an agency communicates it no longer wants the worker’s services, this supports a finding that the agency has joint or de facto power to discharge the worker. See, e.g., Complainants v. Dep’t of Justice, EEOC Appeal Nos. 0120141963 & 0120141762 (Jan. 28, 2015); see also Skanska USA Bldg., Inc., 550 Fed. App’x at 254, 256 (where defendant removed staffing firm’s workers from job site without challenge from staffing firm, and after such removals staffing firm generally fired worker, this pointed to joint employment); Butler v. Drive Auto. Indus. of America, Inc., 793 F.3d 404, 414-15 (4th Cir. 2015).

The EEOC considers an entity's right to control the terms and conditions of employment, whether or not it exercises that right, as relevant to joint employer status. Enforcement Guidance, "Coverage Issues," at Question 2, Example 5 (where an entity reserves the right to direct the means and manner of an individual's work, but does not generally exercise that right, the entity may still be found to be a joint employer).

In assessing the right to control, EEOC does not consider any one factor to be decisive and emphasizes that it is not necessary to satisfy a majority of the factors. The fact that an individual performs work pursuant to a contract between the federal government and an outside organization and is paid and provided with benefits by that organization, on its own, is not enough to show that joint employment does not exist. Rather, the analysis is holistic; all the circumstances in the individual's relationship with the agency should be considered to determine if the agency should be deemed the worker's joint employer. Enforcement Guidance, "Coverage Issues," at Qs. 1 and 2. In sum, a federal agency will qualify as a joint employer of an individual if it has the requisite right to control the means and manner of the individual's work, regardless of whether the individual is paid by an outside organization or is on the federal payroll. See id., at Q. 2.

Here, the staffing firm took care of Complainant's compensation. The EEO counselor asked the Agency Branch Head of Code 8534 and Complainant a series of questions designed to elicit information to decide if the Agency had sufficient control over Complainant's employment to be considered her joint employer. Complainant said that her onsite staffing firm supervisor (S1) and her staffing firm Program Manager controlled when, where, and how she performed her job. When asked who assigned additional projects, Complainant said most direction comes from her staffing firm supervisors, but the Agency Branch Head of Code 8534 and other Agency engineers also assigned some work. The Agency Branch Head said that if there are additional projects that need to be assigned, this was usually done by S1 or other staffing firm personnel, although there were times when a tasking did not go through normal channels because of time constraints. The record shows, however, that when the Agency has asked Complainant to do work, she felt the freedom to decline. For example, when by email on March 20, 2018, an Agency employee asked Complainant to do a document transmittal, Complainant immediately emailed S1 notifying her of this, writing she was too slammed with work to do so, and asked S1 if she could find someone else to assist the Agency employee. In a performance appraisal completed by S1 covering October 1, 2015 – September 29, 2016, S1 wrote that when Complainant had too much work, she needed to reach out to S1 or her staffing firm Program Manager for aid, that S1 has offered to intercede on her behalf at any time, and Complainant simply needs to ask. We find that this evidence does not support a finding that the Agency had sufficient control of Complainant's assignments to be her joint employer.

In response to the EEO counselor's inquiries, the Agency Branch Head of Code 8534 said that while the Agency sets the overall hours for when the staffing firm provides administrative services, S1 approves staffing firm administrative employees' work schedules and hours, and Agency employees do not have the authority to tell a staffing firm employee when to come in or leave work. The staffing firm, via S1 who was onsite, retained control over Complainant's schedule, and we find this also points away from the Agency being Complainant's joint employer.

By letter in September 2018, the Agency Contracting Officer advised the staffing firm that Complainant alleged workplace discrimination. The staffing firm's Chief Operating Officer, by letter dated September 26, 2018, responded that Complainant jointly filed virtually the same allegations she recently presented to the Agency with both the Rhode Island Commission for Human Rights and the EEOC, and prior to this the staffing firm fully and completely investigated each and every allegation and found no merit to her claims. The Chief Operating Officer advised that the Rhode Island Commission for Human Rights found "no probable cause" on Complainant's charge, and closed its file on or about July 13, 2018, and on September 7, 2018, the EEOC adopted Rhode Island's findings. The Rhode Island finding of no probable cause is in the record. The staffing firm's active role in investigating Complainant's concerns implies it retained its authority to act on its findings and is a significant factor pointing to the staffing firm controlling Complainant's employment.

The EEO counselor wrote that in her third interview with Complainant, which occurred on September 6, 2018, Complainant said that she believed she was being harassed by staffing firm employees, that no one in the government was harassing her, and she did not tell anyone in the government about any of her allegations. On September 11, 2018, Complainant wrote the EEO counselor that she rethought their last discussion, and she listed events that she felt were related to Agency personnel, some of which are in the numbered allegations above.

In sum, we find that the Agency did not have sufficient control over Complainant's employment to be deemed her common law joint employer. Because we make this finding, we need not address the Agency's dismissal of some of the issues for failure to state a claim or untimely EEO counselor contact.

The FAD dismissing the complaint is **AFFIRMED**.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) **within thirty (30) calendar days** of receipt of this decision.

A party shall have **twenty (20) calendar days** of receipt of another party's timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant's request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency's request must be submitted in digital format via the EEOC's Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (S0610)

You have the right to file a civil action in an appropriate United States District Court **within ninety (90) calendar days** from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, **filing a civil action will terminate the administrative processing of your complaint.**

RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole

discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant's Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:



Carlton M. Hadden, Director
Office of Federal Operations

May 9, 2019

Date